

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

**ACS AUXILIARIES GROUP, INC.,
and CUMBERLAND ENGINEERING CORP.,**

Plaintiffs,

v.

Case No. 12-C-1290

**NICOS HOLDING CO., INC.
doing business as
NICOS POLYMERS & GRINDING and
COLL MATERIALS EXCHANGE LLC,**

Defendants.

DECISION AND ORDER

As required by the Court's December 21, 2012, Decision and Order, the Plaintiffs, ACS Auxiliaries Group, Inc. and Cumberland Engineering Corp., filed an amended complaint to correct their jurisdictional allegations with respect to the citizenship of Defendant COLL Materials Exchange LLC ("Coll"). (ECF No. 2.) They now allege that "[u]pon information and belief, Brian Coll, a citizen of Ohio, is the only Member of Coll." (Am. Compl. ¶ 5.) (ECF No. 4.)

It is well-settled that a plaintiff claiming diversity jurisdiction pursuant to 28 U.S.C. § 1332 may not do so on the basis of information and belief, only personal knowledge is sufficient. *Am.'s Best Inns, Inc. v. Best Inns of Abilene, L.P.*, 980 F.2d 1072, 1074 (7th Cir. 1992). Alleged jurisdictional facts must be supported by competent proof. *Hertz Corp. v.*

Friend, ____ U.S. ____, 130 S.Ct. 1181, 1194-95, 175 L.Ed.2d 1029 (2010). The burden of persuasion for establishing diversity jurisdiction is on the party asserting it. *Id.* at 1194; *See Muscarello v. Ogle Cnty. Bd. of Comm 'rs*, 610 F.3d 416, 425 (7th Cir. 2010).

Because the Amended Complaint does not properly plead COLL's citizenship, the Plaintiffs have not established that the Court has diversity jurisdiction over this action. The Court must make certain that subject matter jurisdiction exists. However, the Plaintiffs may not have access to the information required to sufficiently plead the citizenship of COLL.

Therefore, consistent with the restraint as counseled by *Muscarello*, 610 F.3d at 425, on unnecessary dismissals when plaintiffs may be able to plead the existence of jurisdiction and when such jurisdiction, in fact, exists, the Court will await COLL's appearance in this action. After COLL has appeared in this action, the issue of COLL's citizenship will be revisited.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

The subject matter jurisdiction issue will be **REVISITED**, after COLL has been served and appears in this action.

Dated at Milwaukee, Wisconsin this 2nd day of January, 2013.

BY THE COURT



Hon. Rudolph T. Randa
U.S. District Judge